HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

LPAOW No. 84/2005, MP No. 85/2005
c/w
LPAOW No. 76/2004, MP No. 115/2004
LPAOW No. 79/2004, MP No. 116/2004.
LPAOW No. 78/2004

Date of decision:15.3.2018

1. R.R. Sarthi	v.	U.O. I & ors.
2. Dharam Singh	v.	U.O. I & anr
3. C.L. Naryana	v.	U.O. I & ors.
4. O.N. Giri	v.	U.O. I & anr

Coram:

Hon'ble Mr. Justice Badar Durrez Ahmed, Chief Justice.
Hon'ble Mr Justice Dhiraj Singh Thakur, Judge

Appearance:

For the appellant(s) : Mr. Ashok Parihar, Advocate in LPASW No. 84/2005.
Mr. Sunil Sethi, Sr. Advocate with
Mr. Ankesh Chandel, Adv.
in LPAOW No. 76/2004.
Mr. V.R. Wazir, Sr. Advocate with
Mr. Abhishek Wazir, Advocate
In LPAOW No. 79/2004.
Mr. Anil Khajuria, Adv in LPAOW No. 78/04.

For the respondent(s) : Mr. Rameshwar Singh Jamwal, CGSC.

i) Whether approved for reporting in Law journals etc.: Yes/No

ii) Whether approved for publication in press: Yes/No

(Per: D.S.Thakur-J)

01. All these Letters Patent Appeals have been preferred against a common judgment and order dated 21.7.2004 passed by the learned Single Judge whereby the writs filed by the appellants challenging the conviction and sentence dated 11.8.1999 passed by the Summary General Court Martial have been dismissed.

02. The following table shall explain the charges and the punishments imposed on each of the appellants:

S.No.	Name of the accused	Charges Framed	Punishment imposed
1.	Naib Subedar C.L. Narayana	Committed a civil offence, i.e., voluntarily causing grievous hurt, contrary to section 325 read with section 34 of the Ranbir Penal Code.	Three years Rigorous imprisonment and dismissal from service.
2.	Naib Subedar Dharam Singh	Committed a civil offence, i.e., voluntarily causing grievous hurt, contrary to section 325 read with section 34 of the Ranbir Penal Code.	Three years Rigorous imprisonment and dismissal from service.
3.	Naib Subdear O.N. Giri	Committed a civil offence, i.e., voluntarily causing grievious hurt, contrary to section 325 read with section 34 of the Ranbir Penal Code.	One year Rigorous imprisonment and dismissal from service.
4.	Sep N/A R.R. Sarthi	(i) Committed a civil offence, i.e., voluntarily causing grievous hurt, contrary to section 325 read with section 34 of the Ranbir Penal Code. (ii) Disobeyed a lawful command given by his superior officers.	**For Charge No. 1:** Two years Rigorous imprisonment and dismissal from service. **For Charge No. 2:** not found guilty.

03. With a view to understand the background in the light of which the present controversy has arisen, it is necessary to give in brief a few material facts.

04. According to the case set up by the prosecution, on 8.11.1997, Capt. Aseem Kapoor of 60 Field Regiment was performing the duties of Convoy Commander from URI to Srinagar and back. On receiving information regarding certain causalities that had taken place on the Srinagar- Jammu highway due to an accident, he proceeded towards 92 Base Hospital in a Jonga. At about 18:30 hrs, after crossing the Batwara check post, he saw two boys walking on the left side of the pavement, one of whom threw an object on the jonga on which Capt. Aseem Kapoor asked the driver to stop the vehicle whereafter he alighted from the vehicle to check the details of the object thrown. On seeing the vehicle stopping, both the boys ran away but ultimately were caught. On being questioned about their identity, the boys remained silent on which Capt. Aseem Kapoor gave a slap to Abhay Kumar Giri. On receiving the slap, the young boy admitted that his other friend Nagesh Raja had thrown "something" on the vehicle. On this, the other boy Nagesh Raja was also caught but remained silent about the object, which had been thrown by him on the vehicle and also kept silent regarding his identity and started weeping.

According to the prosecution story, the boys were then asked to get into the vehicle of Capt. Kapoor when accused No. 2-Dharam Singh (Appellant in LPAOW No. 76/2004) reached at the spot and asked Capt. Aseem Kapoor as to why he was taking those boys. Since the tone and tenor of accused No. 2-Dharam Singh (Appellant in LPAOW No. 76/2004), according to the prosecution, was insolent, Captain Kapoor disclosed his identity as he was dressed in civvies and asked accused No. 2-Dharam Singh (Appellant in LPAOW No. 76/2004) to disclose his identity and further to take him to his

officer under whose command he was serving. The accused No. 2-Dharam Singh (Appellant in LPAOW No. 76/2004) informed him that his Col. was staying there only and they could go there to sort out the matter. The case of the prosecution is that while they were walking towards the Chinar Officer's Enclave, the accused No. 2-Dharam Singh (Appellant in LPAOW No. 76/2004) stopped Capt. Aseem Kapoor and advised him to go to Base Hospital which he agreed to. They walked together along with the boys while the vehicle followed them. On the way, the accused No. 2-Dharam Singh (Appellant in LPAOW No. 76/2004) asked Capt. Aseem Kapoor as to why he was shouting on the children. After reaching the gate of the MI Room of 92 Base Hospital, accused No. 2 Dharam Singh pointing towards Capt. Aseem Kapoor and told the persons present there that "this officer had beaten the JCO's boys". This insolent behavior was said to be a prelude to a major incident involving the JCOs and the men of 92 Base Hospital.

The incident was then reported to Capt. Gopal Singh, Duty Medical Officer, who referred the matter to Col. Anand, who in turn instructed accused No. 2-Dharam Singh (Appellant in LPAOW No. 76/2004) to go to the Senior Registrar /OC Troops. Meanwhile, they met Maj. R.V. Giri. In the meantime, accused No. 1. C.L. Narayana (appellant in LPAOW No. 79/2004) asked Capt. Aseem Kapoor as to why he had beaten his child. Whereafter, Maj. R.V. Giri asked Capt. Aseem Kapoor and accused No. 2-Dharam Singh (Appellant in LPAOW No. 76/2004) to submit a written statement which was complied with by Capt. Aseem Kapoor but not by accused No. 2-Dharam Singh (Appellant in LPAOW No. 76/2004).

As Capt. Aseem Kapoor was coming out of the conference room of 92 Base Hospital at about 20:00 hrs, near the staircase, he saw accused No. 1 C.L. Narayana (appellant in LPAOW No. 79/2004), accused No. 2-Dharam Singh (Appellant in LPAOW No. 76/2004) as also accused No. 3-O.N. Giri (appellant

in LPAOW No. 78/2004) along with some personnel coming towards him and abused him and punched him on his head, face, abdomen and back. It was stated that while Capt. Aseem Kapoor tried to escape from the onslaught and ran in the reverse direction, some more persons emerged from the staircase and 10 persons came from the side of the Unit Line also. Accused No. 4-R.R. Sarthi (Appellant in LPAOW No. 84/2005), who was also highly agitated and was seen using abusive language, punched Capt. Aseem Kapoor and hit him in his abdomen and back.

At about the same time, Lt. Col. M.S. Bindra who was going out of the 92 Base Hospital on seeing the commotion stopped his vehicle and rushed to help Capt. Aseem Kapoor who was bleeding from his nose. He was examined by Capt. Gopal Singh who referred him to Maj. S. Mukherjee ENT specialist, who observed that he had sustained a fracture of the nasal bone which was a grievous hurt.

A court of enquiry was held into the incident followed by recording of the summary of evidence which was held in 1998 and the summary General Court Martial which was held on 7.7.1998.

05. That being aggrieved of the conviction and sentence awarded to them, the appellants preferred writ petitions before the learned Single Judge challenging the same. Besides the relief of certiorari, a direction was also sought for their reinstatement into service and consequential benefits.

06. A number of grounds were taken in the writ petitions, inter alia, (i) that there had been non-compliance of Rule 58 of the Army Rules inasmuch as the incriminating circumstances appearing in the evidence had not been put to the accused in accordance with the mandate of Rule 58 of the Army Rules, (ii) that there was no incriminating material against the accused No. 3 O.N. Giri

(appellant in LPAOW No. 78/2004) on account of voluntary correction made by Capt. Aseem Kapoor in his statement, (iii) that no specific allegation had been made against the accused No. 4- R.R. Sarthi (Appellant in LPAOW No. 84/2005) to bring home any guilt (iv) that there was no legal evidence of commission of an offence under Section 325 RPC and (v) that the issue of alibi even when proved during the Summary General Court Martial by leading evidence in defence had wrongly been decided by the Summary General Court Martial.

07. The writ court by virtue of judgment and order impugned dated 21.7.2004 refused to interfere with the findings of the Summary General Court Martial and the sentence awarded and accordingly dismissed the petitions.

08. The writ court held that while exercising writ jurisdiction under Article 226 of the Constitution of India, it was not supposed to sit as a court of appeal over the proceedings of the Summary General Court Martial and therefore, it was not open to the writ court to re-appraise and re-appreciate the evidence. It was further held that for that reason, the court could not at all venture into identifying the contradictions which were sought to be highlighted in the statements of various prosecution witnesses. It was also held that the court cannot in law substitute its own opinion for the opinion recorded by the Summary General Court Martial as the same would fall within the realm of appreciation of evidence.

09. On the issue of alibi, the writ court however proceeded to hold that no such plea of alibi was ever taken in the proceedings before the Summary General Court Martial. It was held that even in the statement made by the accused, alibi was not projected as a defence and that the plea of alibi was being raised for the first time before the writ court. It was held that the writ court

could not in law consider such a plea in the absence of any evidence and finding by the Summary General Court Martial. Reliance was placed upon **Binay Kumar Singh vs. State of Bihar & anr, AIR 1997 SC 222** on the principles to be followed for accepting the plea of alibi.

10. On the issue of non-compliance of Rule 58 of the Army Rules, it was held that the rule did not envisage that each and every part of the evidence was to be put to the accused and that only such circumstances as are considered by the Judge Advocate as necessary were required to be put to the accused to enable him to defend himself. It was held that since the entire evidence of the prosecution was recorded in the presence of the accused persons and they were given full opportunity to cross-examine the witnesses and also to lead their defence evidence, there was no violation of rule 58 of the Army Rules as no prejudice appears to have been caused to the accused persons. Reliance was placed upon the Supreme Court judgment in **State of Punjab v. Niab Din 2001(8) SCC 578.**

11. It is against the aforementioned judgment and order impugned dated 21.7.2004 passed by the writ court below that the present Letters Patent Appeals have been preferred.

12. Precisely stated, the challenge was limited to the following three grounds:

(i) That the writ court had wrongly held that the plea of alibi was never raised in the proceedings before the Summary General Court Martial and that the same had not been proved by leading necessary evidence or that the plea of alibi was being raised for the first time before the writ court;

(ii) That the judgment and order passed by the writ court as also the order of conviction and sentence by the Summary General Court Martial was bad for non-compliance of Rule 58 of the Army Rules;

(iii) That the order of conviction and sentence passed by the Summary General Court Martial was based upon no evidence and thus suffered from perversity in law.

13. We have heard learned counsel for the parties on these aspects.

Scope of judicial review in court martial proceedings.

14. It is no longer res integra that the courts in exercise of the powers under Article 226 should not interfere with the court martial proceedings unless the court martial was actually without jurisdiction, has exceeded its jurisdiction perversely or arbitrarily.

15. As to what constitutes perversity in law came to be dealt with by the Supreme Court in **Arulvelu and anr vs. State represented by the Public Prosecutor and anr, 2009(10) SCC 206**. Paragraphs 26, 27, 29, 30, 31, 32 and 35 are relevant and reproduced as under:

> *"26. The expression `perverse' has been dealt with in number of cases. In Gaya Din (Dead) through LRs. & Others v. Hanuman Prasad (Dead) through LRs. & Others (2001) 1 SCC 501 this Court observed that the expression `perverse' means that the findings of the subordinate authority are not supported by the evidence brought on record or they are against the law or suffer from the vice of procedural irregularity.*
>
> *27. In Parry's (Calcutta) Employees' Union v. Parry & Co. Ltd. & Others AIR 1966 Cal. 31, the Court observed that `perverse finding'*

means a finding which is not only against the weight of evidence but is altogether against the evidence itself.

29. In M. S. Narayanagouda v. Girijamma & Another AIR 1977 Kar. 58, the Court observed that any order made in conscious violation of pleading and law is a perverse order.

30. In Moffett v. Gough, 1 L.R. 1r. 371, the Court observed that a perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence.

31. In Godfrey v. Godfrey 106 NW 814, the Court defined `perverse' as turned the wrong way, not right; distorted from the right; turned away or deviating from what is right, proper, correct etc.

32. The expression "perverse" has been defined by various dictionaries in the following manner:

> *1. Oxford Advanced Learner's Dictionary of Current English Sixth Edition PERVERSE: Showing deliberate determination to behave in a way that most people think is wrong, unacceptable or unreasonable.*
>
> *2. Longman Dictionary of Contemporary English -*
>
> *International Edition PERVERSE: Deliberately departing from what is normal and reasonable.*
>
> *3. The New Oxford Dictionary of English - 1998 Edition PERVERSE: Law (of a verdict) against the weight of evidence or the direction of the judge on a point of law.*
>
> *4. New Webster's Dictionary of the English Language (Deluxe Encyclopedic Edition) PERVERSE: Purposely deviating from accepted or expected behavior or opinion; wicked or wayward; stubborn; cross or petulant.*
>
> *5. Stroud's Judicial Dictionary of Words & Phrases, Fourth Edition PERVERSE: A perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence.*

35. The meaning of `perverse' has been examined in H. B. Gandhi, Excise and Taxation Officer-cum- Assessing Authority, Karnal &

Others v. Gopi Nath & Sons & Others 1992 Supp (2) SCC 312, this Court observed as under:

> *"7. In the present case, the stage at and the points on which the challenge to the assessment in judicial review was raised and entertained was not appropriate. In our opinion, the High Court was in error in constituting itself into a court of appeal against the assessment. While it was open to the respondent to have raised and for the High Court to have considered whether the denial of relief under the proviso to Section 39(5) was proper or not, it was not open to the High Court re-appreciate the primary or perceptive facts which were otherwise within the domain of the fact-finding authority under the statute. The question whether the transactions were or were not sales exigible to sales tax constituted an exercise in recording secondary or inferential facts based on primary facts found by the statutory authorities. But what was assailed in review was, in substance, the correctness - as distinguished from the legal permissibility - of the primary or perceptive facts themselves. It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."*

16. We shall now proceed to test the decisions impugned on the touchstone of the judicial pronouncements referred to hereinabove.

On Alibi

17. Out of the four appellants, appellant-O.N. Giri had set up the plea of alibi. In fact, from the records produced, it can be seen that in terms of Rule 58 of the Army Rules, the following was the question posed to him and the answer to the same:

Q No. 23 posed to appellant-O.N. Giri

Q: It has come in the evidence of PW-1 that you had caught him by his hand, kicked him and said *Saale Kamine bachon ko marker kahan jayega*. What do you have to say about this?

Ans: I was not there in the hospital compound at all.

18. Not only this, it appears from the record that the appellant O.N. Giri had examined a defence witness namely, Rameshwar Lal for proving that he was not present on the spot at all when the incident had taken place. What was stated by Rameshwar Lal is reproduced as under:

> *"Before being posted to CMDC I was posted in 15 corps Dental Unit. On 8th Nov. 97 I was on leave. Sometime, in the evening at about 1930 h I came to know from my wife that somebody had beaten up the children of Nb Sub Narayana and Nb Sub ON Giri. Then I went out of the quarter. At that time, it was drizzling. Mrs. Narayana and Mrs. Giri were standing outside the quarter of Nb Sub Giri. On my asking as to what had happened, they told me that somebody had come from the hospital and had called Nb Sub Giri to the hospital. In between the children came. After about two to three minutes Nb Sub Giri also reached there. He asked the children as to what had happened and as to what mistake they had done. After that we all sat down in the verandah of Nb Sub Giri's house. I was about to go when Nb Sub ON Giri told me to have a cup of tea. We discussed certain matters regarding his wife's health etc. At about 2020 h I left for my house. On 10 Nov 97 I came to know that an officer had been beaten up and the Nb Sub ON Giri was also said to be involved."*

19. Appellant C.L. Narayana (Accused No. 1) also had set up a plea of alibi. The case set up by him was that at the time of the alleged occurrence, he was performing his duties as a Chief Ward Master in 92 Base Hospital. At this stage, it is relevant to reproduce question No. 14 posed to him and the answer thereto, which is as under:

Q. No. 14: It has come in the evidence that you were the first one to punch PW-1 Capt. Aseem Kapoor.

Ans: It is a totally false statement because at that time I was busy with dead bodies in the M.I Room.

20. Not only this, it appears that appellant C.L. Narayana examined Uday Singh as his defence witness who stated as under:

> *"that Naib Subedar Narayana was with me from 19.30 hrs till 22.30 hrs. During my duty, I was recovering valuables from dead bodies and was noting down injuries, identification marks etc. I was performing my duties with Lt. Col. Anand and Nb Sub Narayana. Nb. Sub Narayana was chief Ward Master. From 1930 hrs till 2230 hrs, Nb Sub. Narayana was with me for the entire period. After 2230 hrs myself and Hav Raj Kumar went to deposit the recovered valuables in the account section. After that I went home."*

21. From the record, it appears that the Summary General Court Martial while dealing with the issue of alibi held as under:

"After considering all the evidence observed by it, the court is of the considered opinion that the accused Nos. 1,2,3 and 4 had voluntarily acted in concert to cause grievous hurt to Capt Aseem Kapoor (PW-1). The testimony of PW-1 supported by substantial evidence convincingly establish that accused No. 1,2,3 and 4 had acted in furtherance of a pre-arranged plan along with some other personnel of 92 Base Hospital.

The court is further of the considered opinion that the pleas of alibi taken by accused Nos. 1,2 and 3 fails to convince due to the contradictions in statements of various witnesses, collaboration of approximate time with accuracy to the nearest minute while failing to recollect other major happenings of that evening and other discrepancies and inconsistencies.

22. From a reading of the so called reasons for the 'findings', it can clearly be seen that what are stated to be the reasons are in fact the conclusions drawn by the Summary General Court Martial. As to how did the court martial appreciate the evidence that was on record and the reasons why the pleas of alibi were not considered convincing or proved is not forthcoming from the so called 'reasons'.

23. While it may not be open for this court to re-appreciate the evidence in the light of the judgments discussed hereinabove, yet the order impugned passed by the Summary General Court Martial can be said to be perverse inasmuch as no reasons at all are forthcoming from the said order as to how the court martial

disbelieved the testimony on record to prove the plea of alibi. In fact the writ court also proceeded to commit an error in law in holding that no such plea of alibi was ever taken in the court Martial proceedings and that the same was being raised for the first time before the writ court. On the face of it, even this finding of the writ court is contrary to the records and thus, cannot be upheld.

On violation of Rule 58 of the Army Rules

24. The other point urged during the course of arguments was that the Summary General Court Martial proceedings leading to the conviction and sentence stood vitiated as the provisions of Rule 58 of the Army Rules had not been complied with. It needs to be seen that the provisions of Rule 58 of the Army Rules are analogous to Section 342 of the Code of Criminal Procedure, 1989 (1933 AD as applicable in the state of Jammu and Kashmir) which is almost analogous to Section 313 of the Central Criminal Procedure Code.

25. It is settled law that if the court fails to pose the needed questions to the accused in terms of the said section, it would result in a handicap to the accused and on that account, he can legitimately claim that such evidence cannot be used against him. Reference in this regard can be made to **Basavaraj R. Patil & ors. Vs. State of Karnataka and ors, (2000) 8 SCC 740.**

26. At this point, it becomes necessary to reproduce the charges against each of the appellants and the questions posed to them in purported compliance to Rule 58 of the Army Rules.

S.No.	Name of the accused	Charges Framed	Questions put to the accused.
1.	Naib Subedar C.L. Narayana	Committed a civil offence, i.e., voluntarily causing grievous hurt, contrary to section 325 read with section 34 of the Ranbir Penal Code.	1. It has come in the evidence that when you were standing outside the Company Commander's office, you had told PW-1 that "Saab apne hamare bachon ko mara, hum apko dekhlenge". What do you have to say about this? 2. It has come in the evidence that when you were standing in front of the office, you were angry and agitated. What do you have to say to this? 3. It has come in the evidence that you had told in front of PW-2 that "saab, officer ke bache aisa kuch karte hain to aap kuch karte nahin aur hamare bache ne kiya to aisa mardiya, ye theek nahi kiya". What do you have to say about this? 4. It has come in the evidence that you were the first one to punch PW-1 on the nose? 5. It has come in the evidence that you tried to drag him out of the ambulance, what do you have to say about this? 6. Can you say as to which flowers grow in the month of Nov? 7. Do you wish to make any statement in your defence? 8. Do you intend to call any witness in your defence?
2.	Naib Subedar Dharam Singh	Committed a civil offence, i.e., voluntarily causing grievous hurt, contrary to section 325 read with section 34 of the Ranbir Penal Code.	1. It has come in the evidence that at the place where the children were slapped, you told PW-1 'insaan ho ua janwar, inhe kahan le jar rahe ho, inhe mat maro', what do you have to say about this? 2. Can you say as to why after first deciding to go your Colonel Sahib's house and walking a little distance, you later decided to go

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			to Base Hospital instead? 3. It has come in the evidence that you had told the sentry on duty in MI room that the officer had beaten your JCOs children. What do you have to say about this? 4. It has come in the evidence of PW-6 that when you were seen in front of Coy Cdr's Office, you were in an angry and agitated mood. 5. It has come in the evidence of PW-2 that you were told to give a written complaint which you did not. What do you have to say about this? 6. It has come in the evidence of PW-2 that when Capt. Aseem Kapoor (PW-1) was narrating the incident to him, you intervened and started arguing with PW-1. What do you have to say about this?
3.	Naib Subdear O.N. Giri	Committed a civil offence, i.e., voluntarily causing grievious hurt, contrary to section 325 read with section 34 of the Ranbir Penal Code.	1. It has come in the evidence of PW-1 that you had caught him by his hand, kicked him and said 'sic, bachon ko marker kahan jayega'. What do you have to say about this? 2. Who told you that your child was beaten up? 3. Can you say as to why you had taken your child for medical examination so late in the night?
4.	Sep N/A R.R. Sarthi	(i) Committed a civil offence, i.e., voluntarily causing grievous hurt, contrary to section 325 read with section 34 of the Ranbir Penal Code. (ii) Disobeyed a lawful command given by his superior officers.	**1.** It has come in the evidence that you were seen in a very agitated mood and you were shouting as to 'ye officer sic, apne aap ko kya samajhte hain, hamare bachon ko mara' what do you have to say about this? **2.** Were you told any reason for the arrest? **3.** Do you wish to make any statement in your defence?

			4. Do you intend to call any witness in your defence.?

27. On a perusal of the aforementioned table, it can be seen that the questions which were posed to the accused, particularly in reference to those posed to appellants Dharam Singh and RR Sarthi, had no relevance to the charge of grievous hurt under Section 325 of the Ranbir Penal Code and no incriminating circumstance or material regarding assault or beating was attributed to them and therefore, in the light of the judgments (supra), the Summary General Court Martial could not have convicted and sentenced the accused-appellants on the basis of such evidence.

28. Upon consideration of the material on record as also the submissions made by the learned counsel for the parties and in view of the observations made hereinabove, we are of the opinion that the judgment and order dated 21.7.2004 passed by the learned Single Judge as also the order of conviction and sentence dated 11.8.1999 passed by the Summary General Court Martial are unsustainable in law and are accordingly, set aside. The appellants would be entitled to all service benefits.

29. The appeals stand disposed of accordingly along with connected MPs.

(Dhiraj Singh Thakur)
Judge

(Badar Durrez Ahmed)
Chief Justice

JAMMU
15.3.2018
Naresh